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ORIGINAL

PRESTON GATES ELLIS &  
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ATTORNEYS

LISA L. FRIEDLANDER  
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RECEIVED

August 10, 1998

AUG 10 1998

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Notice of Ex Parte Presentations, CC Docket No. 97-213**

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206(a)(2), the Center for Democracy and Technology is filing with the Secretary an original and one copy of this notice of an ex parte presentation in the above-captioned proceeding. On August 7, 1998, James X. Dempsey of CDT sent letters to Peter Tenhula, David Wye, Paul Misener, Daniel Connors, Jr., Karen Gulick and Ari Fitzgerald. The letter and its attached summary discusses the legislative history of "call-identifying information" and CALEA's exclusion of location information from the scope of its definition.

Attached are the August 7<sup>th</sup> letters and the summary that accompanied them. In addition, Mr. Tenhula requested a copy of CDT's May 20 comments, which were accordingly provided.

Sincerely,

Lisa L. Friedlander

cc: Peter Tenhula  
David Wye  
Paul Misener  
Daniel Connors, Jr.  
Karen Gulick  
Ari Fitzgerald  
(without attachments)

No. of Copies rec'd  
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August 7, 1998

Peter Tenhula  
Office of Commissioner Michael Powell  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 844  
Washington, D.C. 20554

1634 Eye Street, NW Suite 1100  
Washington, DC 20006  
(202) 637-9800  
FAX (202) 637-0968  
email: info@cdt.org

Dear Mr. Tenhula,

Thank you again for taking the time to talk with us about the privacy issues arising under CALEA.

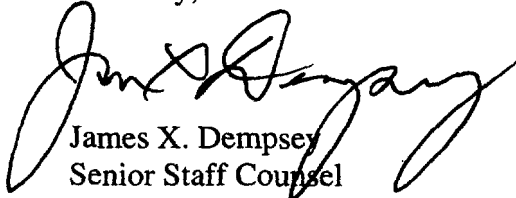
One of the issues that came up in our discussion was the J-STD's provision on wireless phone location tracking and the legislative history of the "call-identifying information" requirement. Enclosed is a brief summary of the FBI Director Freeh's testimony on this question. The testimony of Director Freeh was consistent: at both the March and August hearings, he stated that location information was not a CALEA mandate. Congress relied on these assurances. Congress recognized, however, that some wireless systems, regardless of CALEA, already generated location information, so in an effort to enhance privacy protections, Congress went one step further and precluded carriers from providing location information under a pen register order. It would upset the critical balance Congress strived for if this privacy enhancement were turned into a location information mandate.

Also enclosed for your convenience is a copy of the comments we filed at the Commission on May 20; pages 18 through 34 discuss the call-identifying information requirement and the location information issue.

A copy of this letter and the summary of the Director's testimony will be filed with the Commission secretary.

We would be happy to meet with you at any time to further discuss the privacy issues arising under CALEA.

Sincerely,



James X. Dempsey  
Senior Staff Counsel

Enclosures

August 7, 1998

David P. Wye  
Wireless Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
Suite 5002  
Washington, D.C. 20554

Dear Mr. Wye,

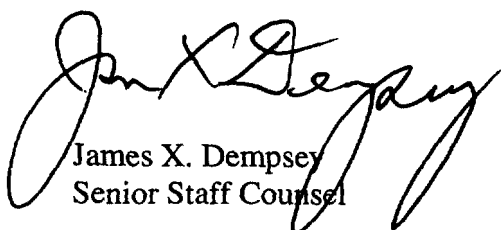
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A copy of this letter and attachment will be filed with the Commission secretary.

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Sincerely,



James X. Dempsey  
Senior Staff Counsel

Attachment

August 7, 1998

Paul Misener  
Office of Commissioner Harold Furchgott-Roth  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 802  
Washington, D.C. 20554

Dear Mr. Misener,

Thank you again for taking the time to meet with us on the privacy issues arising under CALEA.

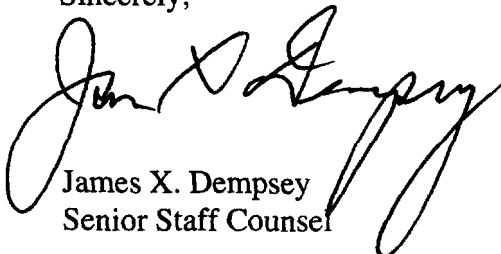
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A copy of this letter and attachment will be filed with the Commission secretary.

We would be happy to meet with you again to answer any questions you might have.

Sincerely,



James X. Dempsey  
Senior Staff Counsel

Attachment

August 7, 1998

1634 Eye Street, NW Suite 1100  
Washington, DC 20006  
(202) 637-9800  
FAX (202) 637-0968  
email: info@cdt.org

Daniel J. Connors, Jr.  
Office of Commissioner Susan Ness  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 832  
Washington, D.C. 20554

Dear Mr. Connors,

Thank you again for taking the time to meet with us on the privacy issues arising under CALEA.

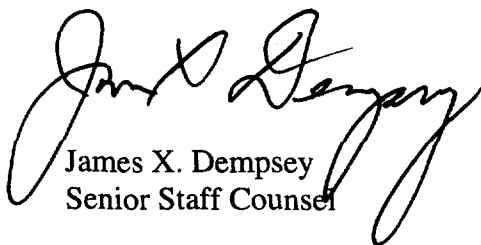
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A copy of this letter and attachment will be filed with the Commission secretary.

We would be happy to meet with you again to answer any questions you might have.

Sincerely,



James X. Dempsey  
Senior Staff Counsel

Attachment

August 7, 1998

Karen Gulick  
Office of Commissioner Gloria Tristani  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 826  
Washington, D.C. 20554

Dear Ms. Gulick,

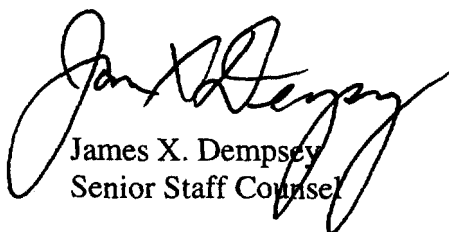
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We look forward to meeting with you on the 13th to discuss this and other privacy issues arising under CALEA.

A copy of this letter and attachment will be filed with the Commission secretary.

Sincerely,



James X. Dempsey  
Senior Staff Counsel

Attachment

August 6, 1998

Ari Q. Fitzgerald  
Office of the Chairman  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 814  
Washington, D.C. 20554

Dear Mr. Fitzgerald,

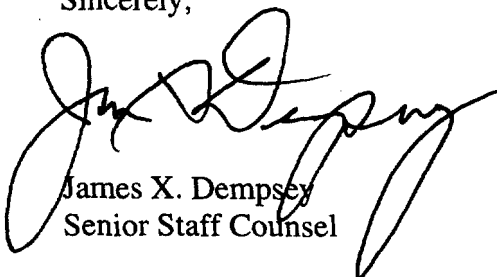
Thank you again for taking the time to meet with us on the privacy issues arising under CALEA.

One of the issues we discussed was wireless phone location tracking and the legislative history of the "call-identifying information" requirement. Enclosed is a brief summary of the FBI Director Freeh's testimony on this question. The testimony of Director Freeh was consistent: at both the March and August hearings, he stated that location information was not a CALEA mandate. Congress relied on these assurances. Congress recognized, however, that some wireless systems, regardless of CALEA, already generated location information, so in an effort to enhance privacy protections, Congress went one step further and precluded carriers from providing location information under a pen register order. It would upset the critical balance Congress strived for if this privacy enhancement were turned into a location information mandate.

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We would be happy to meet with you again to answer any questions you might have.

Sincerely,



James X. Dempsey  
Senior Staff Counsel

Attachment

Location Information Is Not a CALEA Mandate;  
"Call-identifying Information" Is Dialed Number Information

1. At the first hearing on CALEA, March 18, 1994, FBI Director Freeh testified that location information was not mandated by CALEA:

CALEA's mandate "**does not include any information which might disclose the general location of a mobile facility or service...** . There is no intent whatsoever, with reference to this term ['call setup information'], to acquire anything that could properly be called 'tracking' information." Freeh's prepared testimony, Hearings, p. 29 (emphasis added here and in subsequent quotes).

The Director made it clear that the scope of what law enforcement wanted consisted of the content of communications and **dialed number information**, meaning the telephone number dialed by a targeted facility or the telephone number of origin of an incoming call:

"**Law enforcement's requirements** set forth in the proposed legislation include an ability to acquire 'call setup information.' This information **relates to dialing type information** – information generated by a caller which identifies the origin, duration, and destination of a wire or electronic communication, **the telephone number** or similar communication address." Hearings, p. 33.

"What I want with respect to pen registers is **the dialing information**: telephone numbers which are being called, which I now have under pen register authority." Hearings, p. 50.

Under the legislation, common carriers "are required to ensure that the content of communications and **call setup information (dialing information)** can be intercepted." Hearings, p. 27.

In all, Freeh's prepared testimony stated at least ten times that the requirements of the statute were intended to encompass "communications and **dialing information**." Hearings, p. 24 (two references to "dialing information"), p. 27 (four references); p. 28 (four references).

2. Freeh also testified that, "In order to make **clear that the acquisition of such [location] information ... is not included within the term 'call setup information,'** we are prepared to add a concluding phrase to this definition to explicitly clarify this point: '\*\*\*, except that such information [call setup information] shall not include any information that may disclose the physical location of a mobile facility or service beyond that associated with the number's area code or exchange.'" Hearings, p. 33.

3. By August 1994, the term "call setup information" had been changed to "call-identifying information" and the definition had been otherwise modified. Among other things, the phrase offered by the FBI Director to make it clear that location information



was not mandated had been moved out of the definition of “call-identifying information” and into the capability assistance requirement of section 103(a)(2). The FBI now claims that these changes reflected a repudiation of the Director’s earlier assurances. Specifically, the FBI claims that the language initially offered to clarify that location was **not** a mandate had itself become a location information mandate.

**The FBI argument is directly contradicted by the August hearing.** Not only did the Director say nothing to indicate that modifications to the statute had the effect of making location information a mandate, he reaffirmed his assurance that location information was not mandated:

“**Location information** associated with the use of cellular or mobile communications incidental to the execution of pen register court orders **is now excluded**, another important improvement.” Freeh testimony, August 1994, Hearings, p. 114.

4. Notwithstanding Freeh’s assurances that CALEA did not mandate location information, Congress recognized that some wireless systems already generated location information and would continue to do so, apart from CALEA. See H. Rep. 103-827, p. 17. While Congress did not wish to encourage or discourage this development, it wished to make it clear, as one of the privacy enhancements it included in CALEA, that carriers could not provide location information under a mere pen register order. That is what the language in section 103(a)(2) does. *Id.* (Congress did not specify what standard should apply, it just made it clear that it had to be something stronger than a pen register order.) This privacy enhancing language cannot be turned into a location information mandate. It is especially illogical to conclude that Congress, in prohibiting carriers from providing existing location information under a pen register, would have been requiring them to build a location tracking capability available under some other, unspecified standard.

5. Congress relied on the Director’s consistent testimony that location information was not mandated. The reports of both the House and Senate Judiciary Committees state that:

“[CALEA requires carriers to] isolate expeditiously information identifying the originating and destination number of targeted communications, **but not the physical location of targets.**” H. Rep. 103-827, p. 16. (The Committee reports are identical in all relevant respects.)

The reports make it clear that “call-identifying information,” like “call setup information,” is limited to dialed number information:

For voice communications [call-identifying information] is typically the electronic pulses, audio tones, or signalling messages **that identify the numbers dialed or otherwise transmitted** for the purpose of routing calls through the telecommunications carrier’s network. In pen register investigations, these pulses, tones, or messages **identify the numbers dialed** from the facility that is the subject

of the court order or other lawful authorization. In trap and trace investigations, these are the incoming pulses, tones or messages **which identify the originating number** of the facility from which the call was placed. ... ." H. Rep. 103-827, p. 21.

6. From the foregoing, it should be clear that the statute is not ambiguous – location information is not a CALEA mandate. However, if the statute's requirements were viewed as being ambiguous, i.e., if it were found to be unclear whether location information is required or not, then the ambiguity must be resolved against the mandate, for Congress made it clear that it intended the requirements of the act to be read narrowly:

"The Committee expects industry, law enforcement, and the FCC to narrowly interpret the requirements." H. Rep. 103-827, p. 23.